Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

SUSAN D. BIERI
and
LEONARD D. BIERI, III,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE APPEALS COURT VIOLATED ACCEPTED PRINCIPLES OF APPELLATE REVIEW BY FAILING TO APPLY THE "CLEARLY ERRONEOUS" STANDARD AND BY INSTEAD SUBSTITUTING ITS OWN FACTUAL FINDINGS FOR THOSE OF THE DISTRICT COURT.

II. WHETHER THE APPELLATE COURT'S DEVELOPMENT OF ITS OWN FACTUAL FINDINGS AND ITS ASSUMPTION OF THE DISTRICT COURT'S PROPER ROLE DEPRIVED PETITIONERS OF THEIR RIGHT TO AN APPEAL, THEREBY VIOLATING THEIR CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW.

III. WHETHER THE FORFEITURE OF PETITIONERS' FARM IS PROHIBITED BY THE EIGHTH AMENDMENT ON THE BASIS THAT IT CONSTITUTES AN EXCESSIVE FINE.

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CITATIONS OF OFFICIAL REPORTS OF OPINIONS IN CASE

The opinion of the United States Court of Appeals for the Eighth Circuit whose review is sought by Petitioners was decided and filed on October 13, 1995. The opinion is reported as *United States v. Bieri*, 68 F.3d 232 (8th Cir. 1995), and is set forth in the Appendix at A4-A16.

STATEMENT OF JURISDICTION

The appeal of *United States v. Bieri* whose review Petitioners seek, was decided by a panel of the United States Court of Appeals for the Eighth Circuit on October 13, 1995. *United States v. Bieri*, Case No. 95-1234WMS, 68 F.3d 232 (8th Cir. 1995). (App. at A4.)

Petitioners filed a Petition for Rehearing by the Panel With Suggestions for Rehearing En Banc on November 6, 1995. The Petition was denied on December 7, 1995. (App. at A2.) Petitioners filed their Motion to Stay the Mandate on December 13, 1995. The Motion was granted by the Eighth Circuit Court of Appeals on December 20, 1995, ordering that the Mandate be stayed until March 6, 1996. (App. at A1.) Petitioners timely file this Petition for Writ of Certiorari on or before March 6, 1996.

The United States Supreme Court has jurisdiction to review this Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1254(1)(1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment V states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VIII states:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

A. Procedural Statement of the Case

On February 14, 1992, the Government charged Leonard and Susan Bieri by a superseding indictment of four counts: Count One, conspiracy to possess with intent to distribute marijuana; Count Two, possession with intent to distribute marijuana; Count Three, use of a firearm in relation to drug trafficking. Count Four sought criminal forfeiture of the Bieris'

dairy farm. The Bieris waived trial by jury and were tried on July 8, 1992, by the United States District Court for the Western District of Missouri, Southern Division. The court found Leonard and Susan Bieri guilty of Counts One and Two. The court acquitted both on Count Three. The court declared forfeiture as to Count Four.

The district court sentenced the Bieris on April 2, 1993, and also ordered forfeiture as to Tract Four of appellees' farm, the tract where the marijuana was seized from the home and outbuildings. Leonard and Susan Bieri appealed their convictions and their sentences of fifty-seven (57) and fifty-one (51) months, respectively. Both the Bieris and the Government appealed the district court's order of forfeiture. The Bieris appealed the forfeiture of Tract 4, while the Government appealed the denial of forfeiture as to the remainder of the property. The Eighth Circuit affirmed the Bieris' sentences and convictions, *United States v. Bieri*, 21 F.3d 811 (8th Cir.), *cert. denied*, 115 S. Ct. 208 (1994), but remanded for further proceedings on the forfeiture, *United States v. Bieri*, 21 F.3d 819 (8th Cir.), *cert. denied*, 115 S. Ct. 208 (1994) (App. at A23). The Eighth Circuit held that 21 U.S.C. § 853 required forfeiture of the entire farm, but remanded so the district court could address the constitutionality of the forfeiture. The Bieris filed a consolidated Petition for Writ of Certiorari seeking review of both Eighth Circuit decisions. The Supreme Court denied the petition. (App. at A21).

On remand, the district court was directed to determine whether forfeiture of the Bieri farm constituted an "excessive fine" under the Eighth Amendment. (App. at A18-20.) On

December 20, 1994, the district court held a hearing on the forfeiture issue. Both the Government and the Bieris presented evidence at this hearing. At the end of the hearing, the district court ruled orally, denying forfeiture of any property. On December 21, 1994, the district court issued written supplemental findings which stated that the Bieri farm had an appraised value of not less than $245,000.00 and that the best interests of the Bieris' children would be served by allowing them to remain on the farm. (App. at A17.)

The government appealed the district court's orders of December 20, 1994, and December 21, 1994. The Eighth Circuit, in a two-to-one opinion issued October 13, 1995, reversed the district court's ruling. *United States v. Bieri*, 68 F.3d 232 (8th Cir. 1995). Relying largely on the nature of the Bieris' illegal actions, the alleged value of the marijuana and the dollar value of the farm, the Court concluded that forfeiture of the farm was not an excessive fine under the Eighth Amendment. (App. at A16.) Senior Circuit Judge John R. Gibson, dissenting, wrote that the Court should have remanded to the district court with directions to conduct an appropriate analysis under the Eighth Amendment's excessive fines clause. (App. at A16.)

Petitioners filed their Petition for Rehearing by the Panel with Suggestion for Rehearing En Banc on November 6, 1995. The petition was denied on December 7, 1995, with five judges indicating that they would grant rehearing en banc. (App. at A2).

Petitioners filed their Motion to Stay the Mandate on December 13, 1995. The Court granted the motion on December 20, 1995, staying the mandate until March 6, 1996. (App. at A1.)

B. Factual Statement of the Case

Leonard and Susan Bieri are dairy farmers. For ten years, they raised dairy cows and other livestock on their south-central Missouri farm, eventually establishing a Grade A milking operation.

Mr. and Mrs. Bieri are now incarcerated, serving sentences of 57 and 51 months, respectively, for their convictions on marijuana offenses. Their children, Jesse, age 11, and Sarah, age 8, are living with relatives until their parents are released. The Government seeks forfeiture of the Bieris' entire 529-acre farm even though only one of the four tracts was used to store marijuana.

The offense that gives rise to the present forfeiture action occurred on January 14, 1992. On that date, a man named George Ruiz made a controlled delivery of forty-five (45) pounds of marijuana to the Bieri farm. Police officers had stopped Ruiz as he was traveling in Oklahoma, and he gave them consent to search his vehicle. When officers discovered the marijuana, he told them that he had picked it up in Arizona and was preparing to deliver it to Leonard Bieri. Police executed an anticipatory search warrant at the Bieri farm that evening, finding additional marijuana as well as equipment for weighing and packaging it. Some of the marijuana was found

in the house, and some was found in the outbuildings on the farm, including the milking parlor.

When the Eighth Circuit in the first appeal remanded to the district court for further consideration, it directed the district court to consider "all of the circumstances of the case including the extent and length of the defendant's drug activity" in determining whether forfeiture of the entire farm would constitute an excessive fine under the Eighth Amendment. *United States v. Bieri*, 21 F.3d at 825. To permit adequate consideration of all of the factors that may play a role in an excessive fines analysis -- including not only the seriousness and nature of the crime and the connection between the offense and the property, but also the tangible and intangible value of the property, the character of the property, and the impact of the forfeiture on innocent occupants -- the district court held an evidentiary hearing on December 20, 1994. Both sides presented testimony and other evidence at the hearing.

The testimony included that of the Bieris' former field representative for Kraft General Foods, Joe Klineline, who stated that the Bieris were satisfactory producers, that they adhered to Kraft requirements, accepted his advice and updated their equipment and barn to meet accepted standards.

The Bieris had purchased their farm, a combination of pasture, crop, and timber land, in 1984. They acquired the property via a general warranty deed that was released from escrow in 1990. The irregularly shaped farm is comprised of four tracts, each separately described in the deed. Three of the tracts are in Taney County, and one is in Ozark County.

The Bieris' children, Jesse and Sarah, were also present at the evidentiary hearing so that they could testify about how they would be affected by the loss of their home and farm. Because of their young ages and the nature of their anticipated testimony, the parties stipulated to the substance of the children's testimony. The testimony subsequently was proffered through counsel, who stated she had visited at length with the children prior to the hearing. Counsel stated that the children told her, in so many words, that they were very attached to the farm and very much wished to stay there. The Bieris also presented as evidence various snapshots depicting the family's life on the farm as well as 4-H posters done by the children.

Susan Bieri also testified at the hearing, identifying the sources of funds used to pay for the farm. Mrs. Bieri testified that some of the money was obtained from the sale of another property and that friends of theirs had loaned them some money. She testified that these funds were not derived from illegal activity.

The Bieris also presented evidence as to the monetary value of the farm. Charles Crowley, a Certified General Appraiser with substantial experience in the area of farm appraisals, testified that in his opinion, the farm was worth $340,000.00. He based his conclusion on his analysis of the farm under three different appraisal approaches -- the sales comparison approach, the cost approach, and the income approach.

At the time that Mr. Crowley visited the property, the Bieris were operating a Grade A dairy farm. Mr. Crowley observed a bulk milk tank, a pipeline milker, feed tanks, and "everything that's needed to produce milk." He also stated that the Bieris' farm appeared to be similar to other dairy farms in the area. Mr. Crowley testified that the appraisal figure of $340,000.00 was based on present day value. He testified that it was possible the farm was worth 30% less in 1992, which was the year that the Bieris were arrested.

The Government also presented the testimony of a licensed appraiser, Mr. Bob Bryant. Mr. Bryant testified that he conducted his appraisal of the Bieri farm in January 1993 and appraised its value at that time as $152,400.00. He described the Bieris' property as "a typical Ozark farm."

At the forfeiture hearing, the Government presented no evidence regarding the Bieris' offense. As is stated in the procedural history, the Bieris had previously been found guilty by the Court of possession with intent to distribute marijuana and conspiracy to d the same. The Eighth Circuit affirmed their convictions and sentences.

The evidence presented at the Bieris' July 1992 trial included the testimony of George Ruiz, who stated that he was instructed by Eddie Padilla to meet Leonard Bieri at a McDonald's parking lot in Branson, Missouri, in February or March 1990. Mr. Ruiz testified that he had about sixteen pounds of marijuana that he had transported from Arizona. He testified that he followed Leonard Bieri to the farm and took the marijuana inside. He testified that he met Susan Bieri at

that time and was paid $300.00 in traveling expenses. Ruiz testified that in the fall of 1990, he again traveled from Arizona to the Bieri residence for the purpose of delivering about thirty pounds of marijuana. In March 1991, he again visited the Bieri farm but did not deliver any marijuana at that time.

On January 14, 1992, Ruiz was stopped by law enforcement officers outside Vinita, Oklahoma. Ruiz consented to the search of his vehicle, and officers discovered about forty-five pounds of marijuana. Ruiz agreed to cooperate with police, and made a controlled delivery of the marijuana to the Bieri residence. Later that evening, law enforcement officers executed an anticipatory search warrant and recovered both the marijuana that Ruiz had delivered as well as additional marijuana that had been stored in the house and outbuildings on the farm. In all, officers recovered approximately one hundred and forty-one pounds of marijuana that was stored throughout the Bieri home and the outbuildings on the farm. This included the amount delivered by Ruiz.

All of the marijuana was found on Tract 4 of the farm, where the house and all of the outbuildings are located. Law enforcement agents also recovered packaging material, a scale, and a device that seals plastic bags.

Law enforcement officers seized notes that were identified by a handwriting expert as having been written by Susan Bieri. The notes contained the figure "1250," which a special agent testified would indicate a wholesale price of $1,250.00 per pound of marijuana. The notes also included the figure "42," which an agent testified represented the forty-two pounds of

marijuana that was delivered by Ruiz. The reference in the note to "300" represented the $300.00 expense money paid to Ruiz by Susan Bieri, testified the agent.

At the Bieris' sentencing hearing, the district court stated that had it been writing on a "clean slate," it would have imposed probation on both Mr. and Mrs. Bieri. The court reiterated these statements at the December 1994 forfeiture hearing, adding that Mr. and Mrs. Bieri had "lived almost three years on bond without any criminal incidents." (App. at A18.)

At the end of the forfeiture hearing, the court orally denied forfeiture, finding that the Eighth Circuit case, *United States v. One Parcel of Real Property Located at 9638 Chicago Heights*, 27 F.3d 327 (8th Cir. 1994), identified the factors that should be considered in an excessive fines analysis. The court further stated that the sentencing guidelines had required the sentences of fifty-seven (57) months and fifty-one (51) months; that the terms of imprisonment were "enough penalty for the criminal activity associated with the property"; that the property was used as both a residence and a business; that the two minor children who lived on the property "are dependent somewhat upon that residence"; that the simultaneous incarceration of both parents will cause the children to "suffer greatly"; and that when you "sentence parents you sentence children."[1] (App. at A18-A20.)

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1 The Bieris had requested that the court permit them to serve their sentences sequentially so that the children would not be deprived of the presence of both parents at the same time. The court denied this request.

The court then stated:

> As a normal rule, any time a fine is imposed within the statute or no fine is imposed, it's discretionary with the trial court. I don't know whether that's true in regard to a forfeiture or not but I'm going to test it. It's the judgment of the Court that no forfeiture of the defendants' farm be declared in this case.

(App. at A20)

The Court issued supplemental written findings the following day. In its order, the Court stated:

> As a supplement to the findings made by the Court following a hearing on the forfeiture of the Bieris' farm, the Court finds that the reasonable value of the defendants' farm is not less than $245,000.00.
>
> The Court further finds it would be in the best interests of the children that they be permitted to remain at the residence which is located on the farm.

(App. at A17.)

The United States appealed the district court's orders of December 20 and December 21, 1994. The Eighth Circuit reversed the district court's judgment and held that the forfeiture of the farm was not excessive. In a two-to-one opinion, the Eighth Circuit rejected the district court's findings, although it did not state at any point that it found such findings "clearly erroneous." In finding that forfeiture did not offend the Eighth Amendment, the appeals court relied primarily on the nature of the Bieris' alleged illegal actions, the alleged

value of the marijuana, and the dollar value of the farm (App. at A4-A16.)

REASONS FOR GRANTING THE WRIT

I. WHETHER THE APPEALS COURT VIOLATED ACCEPTED STANDARDS OF APPELLATE REVIEW BY FAILING TO APPLY THE "CLEARLY ERRONEOUS" STANDARD AND BY INSTEAD SUBSTITUTING ITS OWN FACTUAL FINDINGS FOR THOSE OF THE DISTRICT COURT.

The district court is uniquely positioned to make factual findings. The proper role of the reviewing court is to review those findings, not make them anew. These principles are long-established and beyond dispute. As this Court stated in *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985), a reviewing court "oversteps the bounds of its duty under [Federal Rule of Civil Procedure] 52(a) if it undertakes to duplicate the role of the lower court." *Id.* at 573. This Court added: "'In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo.'" *Id.* (quoting *Zenith Radio Corp v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969)).

In deciding the government's appeal of the district court's order denying forfeiture, the Eighth Circuit ignored these long-standing principles and overstepped the bounds of its proper role as the reviewing court. It did so even while acknowledging that the district court "expressly considered"

the proper legal principles relevant to an excessive fines analysis and made factual findings pertinent to such an analysis. (App. at A11-A12.) Those factual findings concerned "the criminal sanctions imposed, the value of the farm, and its importance as a residence for the Bieris' innocent minor children." The claimed failure of the district court's ruling was its failure to state an "express conclusion." (App. at A12.) The Eighth Circuit's opinion also criticized the district court's use of the word "discretion," stating that the district court did not possess any discretion that it could have properly exercised in this case. (*Id.*) With no reference to the standard of review, the Eighth Circuit rejected the district court's findings although making no statement that such findings were "clearly erroneous." The appellate court's unsanctioned leap into the role of fact-finder is apparent in numerous statements such as: "Weighing the gravity of the offenses against the severity of the criminal sanctions, we find no great imbalance." (App. at A12.) Clearly, the appellate court is making its own "findings."

The Eighth Circuit's criticism of the district court's ruling elevates form over substance. First, the Eighth Circuit complains that the district court failed to recite the proper words -- "excessive fines" -- in its conclusion. Although not ritualistically reciting the supposed key words, the district court made clear that it was conducting an excessive fines analysis. It expressly considered the nature and extent of the crime, the culpability of the defendants, the severity of the punishment, the value and character of the property, and the fact that innocent occupants, the Bieris' children, lived on the property with their parents. The Eighth Circuit's complaint that the

district court failed to include the words "excessive fines" in its ruling ignores the substance of that ruling. It is well established that a district court need not utter any "magic words" if the basis for its decision is apparent. *See, e.g., United States v. Evans*, 697 F.2d 240, 249 (8th Cir. 1983), *cert. denied*, 460 U.S. 1086 (1983).

Second, the Eighth Circuit complains that the district court appeared to rely on non-existent "discretion" in making its decision.[2] Certainly, the district court could have expressed itself more artfully or with greater precision. The complaint about the district court's use of the word "discretionary" misses the mark, however. The district court's reference to discretion followed its earlier observation that it had previously decided not to impose a fine because any remaining property was needed for the family. The district court thus considered particular factors that are relevant in an Eighth Amendment analysis. Not only did it have the "discretion" to consider these factors, it was in fact directed to do so by precedent of the Eighth Circuit. *See, e.g., United States v. One Parcel of Real*

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2 The district court stated:

> I don't know why the Eighth Circuit sent the case back. There's no evidence as to the value of any particular tract -- there were four tracts. Tract four where the house and barn was [sic] located was forfeited at the time of the sentence and I felt that was appropriate because that's where the drug trafficking occurred, that's where the drugs were being stored. Obviously that was not appropriate. As a normal rule, anytime a fine is imposed within the statute or no fine is imposed, it's discretionary with the trial court. I don't whether that's true in regard to a forfeiture or not but I'm going to test it.

Property Located at 9638 Chicago Heights, 27 F.3d 327 (8th Cir. 1994); *United States v. Alexander*, 32 F.3d 1231 (8th Cir. 1994).

In any event, if the Eighth Circuit concluded that the district court made insufficient factual findings or did not conduct a complete Eighth Amendment analysis, the proper remedy was for the appeals court to remand to the district court for further findings and analysis. *See* dissent of John R. Gibson, Senior Circuit Judge, App. at A16. Instead, the Eighth Circuit usurped the role of the district court, making its own factual findings concerning the culpability of the defendants, the dependance of the children on the residence, the severity of the crime as measured against the harshness of the penalty, and the connection between the offense and the property. In so doing, the Eighth Circuit acted as a second district court, not a court of appeals. By abandoning its proper role as a reviewing court, the Eighth Circuit violated long-established principles of appellate review and, as discussed in section II, *infra,* effectively denied the Bieris their right to an appeal.

Numerous cases of the Supreme Court and the courts of appeal establish that the proper role of a reviewing court does not include deciding factual issues *de novo*. As this Court stated in *Anderson v. City of Bessemer City*, a reviewing court transgresses its boundaries if it undertakes to duplicate the role of the district court. 470 U.S. at 573. The traditional deference accorded the trial court as the finder of fact is not limited to findings that depend upon determinations of credibility. *Id.* at 574. "The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise." *Id.*

The principles of *Bessemer City* have been recognized and applied in countless cases in the lower courts. *See, e.g., Festo Corp. v. Shoketsu Kinzuko Kogyo Kabushiki Co., Ltd.*, 72 F.3d 857, 863 (Fed. Cir. 1995); *McGee v. Equicor-Equitable HCA Corp.*, 953 F.2d 1192, 1204 (10th Cir. 1992); *Craft v. Metro Media, Inc.*, 766 F.2d 1205, 1211-12 (8th Cir. 1985) *cert. denied*, 475 U.S. 1058 (1986). In *McGee*, the Tenth Circuit recognized the proper limitations upon the role of the appellate court when it reviews the factual findings of a lower court. "We find the district court's account of the facts rational, and we refuse to duplicate the role of the factfinder." 953 F.2d at 1204. The principle that an appellate court should not engage in fact finding but should instead confine itself to a review of the facts found by the lower court applies in criminal cases as well as civil. *See, e.g., United States v. Alaniz-Alaniz*, 38 F.3d 788, 790 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1412 (1995) (applying clearly erroneous standard as defined in *Bessemer City*); *United States v. Jones*, 31 F.3d 1304, 1315 (4th Cir. 1994) (if issue turns primarily on factual determination, reviewing court applies "clearly erroneous" standard); *United States v. Brown*, 944 F.2d 1377, 1379 (7th Cir. 1991) (clearly erroneous standard of *Bessemer City* applies to findings made by district court at sentencing).

In the present appeal, the Eighth Circuit, rather than permitting the district court to cure any deficiencies in its analysis or factual findings, simply rejected the lower court's findings and issued its own. The Eighth Circuit's opinion clearly transgresses the principles of *Bessemer City* by "duplicat[ing]" the role of the lower court. *See Bessemer City*, 470 U.S. at 573. The appeals court simply rejected the lower

court's findings without finding them to be clearly erroneous. Under *Bessemer City*, this is not permissible.

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous.

Id. at 574.

Rejecting the analysis of the lower court, the Eighth Circuit made these findings: (1) that the extent and duration of the criminal conduct in the Bieris' case was not minimal; (2) that no great imbalance existed between the gravity of the offense and the severity of the criminal sanctions; (3) that there was rough equality between the supposed wholesale value of the marijuana and the monetary value of the farm, and that such equality was convincing evidence that the forfeiture of the entire farm was not grossly disproportionate; and (4) that the Bieris' expressed concern for their children's best interests was not persuasive given the nature of their illegal actions. (App. at A12-A16.) The court's development of its own factual findings is particularly apparent in the following passage:

> The effect of forfeiture certainly will be a hardship on the children. In reality, however, both parents are now in jail, and the children cannot remain on the farm by themselves. Children are not dependent on a

> residence, but on their parents. Here, the parents chose to engage in highly illegal conduct grossly inimical to the best interests of their children, purposefully using the children's home to do so. Their current concern for the children's best interests rings hollow given their prior willingness to use the children's home with the children living in it as a wholesale drug distribution center. While we have no doubt that the children are very attached to the farm, we cannot consider the intangible value of the farm in isolation from the culpability of both parents. We conclude that the parents' culpability in this case far outweighs the intangible value of the property and that the adverse effect of forfeiture on the children does not render the forfeiture unconstitutionally excessive.

(App. at A14-A15.)

The district court made express factual findings on these identical subjects. For instance, the district court concluded that although the Bieris had clearly violated the law, that the nature of their criminal activity was such that had the court been "writing from a clean slate," it probably would have placed the Bieris on probation. (App. at A18.) The Court then observed that the simultaneous incarceration of both parents for periods of 51 and 57 months was "enough penalty for the criminal activity associated with the property." (App. at A19.) Certainly, the district court's use of the word "enough" makes clear its conclusion that additional punishment beyond the prison terms would be "excessive." The district court also observed that the property was used as a business and a

residence, and that the Bieris' two small children were dependent upon that residence. (App. at A19, A17.)

The Eighth Circuit, apparently dissatisfied with the district court's factual findings, abandoned its role as a reviewing court and stepped into the role of fact-finder. In so doing, it violated long-established principles of appellate review and acted as a district court.

Based on the Eighth Circuit's failure to apply the proper standard of review and adhere to its proper role as a reviewing court, this Court should grant the Bieris' petition for writ of certiorari as to the decision of the Eighth Circuit.

II. WHETHER THE APPELLATE COURT'S DEVELOPMENT OF ITS OWN FACTUAL FINDINGS AND ITS ASSUMPTION OF THE DISTRICT COURT'S PROPER ROLE DEPRIVED PETITIONERS OF THEIR RIGHT TO AN APPEAL, THEREBY VIOLATING THEIR CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW.

When the Eighth Circuit abandoned its role as a reviewing court and stepped into the role of district court, *see* discussion at section I, *supra*, it effectively deprived the Bieris of their right to appeal. Clearly, the appellate court made its own factual findings. Because there is no right to an appeal before the Supreme Court, those findings may never be subject to review by a reviewing court. The appellate court's actions deprived the Bieris, arbitrarily and unreasonably, of their right to appeal adverse factual findings. As a result, the Bieris were

denied due process of law as guaranteed by the Fifth Amendment of the United States Constitution.

Although the Constitution does not require that criminal defendants be afforded a first appeal as of right, if the government has extended such a right, then the procedures used in deciding the appeals must comport with the due process and equal protection clauses of the Constitution. *Evitts v. Lucey*, 469 U.S. 387, 393 (1985) (citing *Griffin v. Illinois*, 351 U.S. 12, 18 (1956)). The Due Process Clause requires fair procedures and a fair process; such fairness is violated if an appeal is decided in an arbitrary fashion. *See Evitts,* 469 U.S. at 403-04, *see also Austin v. United States*, 115 S. Ct. 380, 381 (1994) (recognizing that indigent defendants pursuing appeals as of right have a constitutional right to the assistance of an attorney); *Anders v. State of California*, 386 U.S. 738, 742-43 (1967) (defendant was denied constitutionally required fairness and equality when appointed counsel failed to file a brief on his behalf without taking adequate steps to protect his client's rights).

In the federal court system, the appellate courts are "'an integral part of the system for adjudicating the guilt or innocence of a defendant.'" *Evitts*, 469 U.S. at 393. All defendants have a first appeal as of right from an adverse judgment in the district court. *See* 28 U.S.C. § 1291. *See also* Fed. R. App. P. 3(c) and 4(b). Clearly, the government has created a system in which a first appeal as of right is available to every defendant convicted of a criminal offense. Given the universal extension of that right, it is arbitrary and unreasonable and, thus, violative of due process if an appellate

court abandons its proper role and effectively extinguishes the right to appeal. Because there is no appeal as of right from the decision of an appellate court turned factfinder, a defendant in such a situation arbitrarily loses the right to have the decision examined by a reviewing court.

Clearly, the Eighth Circuit's failure to hew to the proper role of an appellate court violated the Bieris' constitutional right to due process. The Eighth Circuit's development of its own factual findings and its assumption of the district court's proper role was arbitrary and unreasonable and deprived the Bieris of the fair process and fair procedures demanded by the Due Process Clause. *See Evitts*, 469 U.S. at 404.

The Bieris assert that the district court in this case made adequate factual findings to support its ruling and that such findings should have been reviewed by the Eighth Circuit Court of Appeals under the appropriate standard of review. As acknowledged in *Bessemer City*, *supra*, that standard is the "clearly erroneous" one. The Bieris assert in the alternative that if the Eighth Circuit determined that the factual findings by the lower court were not adequate, then the proper remedy was for the Eighth Circuit to remand to the district court for further factual findings rather than appropriating for itself the role of factfinder. The Eighth Circuit's actions arbitrarily deprived the Bieris of their right to appeal and thus violated their constitutional right to due process of law.

Based on the foregoing, this Court should grant the Bieris' petition for writ of certiorari as to the decision of the Eighth Circuit Court of Appeals.

III. WHETHER THE FORFEITURE OF PETITIONERS' FARM IS PROHIBITED BY THE EIGHTH AMENDMENT ON THE BASIS THAT IT CONSTITUTES AN EXCESSIVE FINE

The Bieris' farm is their home, their place of business, and their primary asset. The forfeiture of the farm clearly constitutes an excessive fine within the meaning of the Eighth Amendment. As the district court properly found, the farm has significant value, not only in monetary terms, but also as the home of the family. The farm is the site of the family's business and the source of the family's livelihood. The family, including the Bieris' small children, are dependent upon the farm. Leonard and Susan Bieri are already being punished substantially through stiff prison terms. All of these factors clearly establish that the forfeiture of the Bieris' farm constitutes an excessive fine within the meaning of the Eighth Amendment. The district court properly reached this conclusion, and the Eighth Circuit erred by concluding otherwise.

To determine whether forfeiture of a defendant's property constitutes an excessive fine, the court must first determine which test properly applies to this Eighth Amendment analysis. Since this Court issued *Alexander v. United States*, 113 S. Ct. 2766 (1993) and *Austin v. United States*, 113 S. Ct. 2801 (1993), the lower courts have endeavored to translate the broad principles of those cases into well-defined tests for determining excessiveness challenges under the Eighth Amendment. In general, the courts have developed two separate, but partially overlapping approaches, the "proportionality" approach and the

"instrumentality" approach. *Cf. United States v. Real Property Located at 6625 Zumirez Drive*, 845 F. Supp. 725 (C.D. Cal. 1994); *United States v. Chandler*, 36 F.3d 358 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1792 (1995). The first approach generally encompasses a broad variety of factors, such as the value of the property and the severity of the total sentence imposed in relation to the crime, while the second focuses more narrowly on the relationship between the property and the offense. Recently, a third approach has also emerged: the combined test utilized in the Ninth Circuit. *See United States v. Real Property Located in El Dorado County at 6380 Little Canyon Road*, 59 F.3d 974 (9th Cir. 1995). Under the latter approach, the court must conduct a two-step analysis, first considering whether the property being forfeited constitutes an instrumentality of the offense. *Id.* at 983-85. As a "check" on the harshness of that test, the court must then determine whether the magnitude of the forfeiture is proportionate to the offense committed. *Id.* In determining proportionality, the Ninth Circuit directed the district court to consider: the fair market value of the property, the intangible, subjective value of the property, the impact of forfeiture on the financial condition of the defendant's family, and the culpability of the property's owner, including whether the owner was directly involved in the illegal activity, and the degree of harm caused by the illegal activity. *Id.*

Although the various approaches adopted by the courts of appeal have common elements, a circuit split exists over the question of which test should be applied. The ongoing confusion in this area indicates the issue is ripe for review by this Court.

In the Bieris' case, the Eighth Circuit properly determined that a multi-factor, proportionality test should be applied when the forfeiture of property is challenged as an excessive fine under the Eighth Amendment. The Court stated:

> To determine whether the facts indicate gross disproportionality, the district court must consider multiple factors, including the extent and duration of the criminal conduct, the gravity of the offense weighed against the severity of the criminal sanction, and the value of the property forfeited...."'Other helpful inquiries might include an assessment of the personal benefit reaped by the defendant, the defendant's motive and culpability and, of course, the extent that the defendant's interest and the enterprise itself are tainted by the criminal conduct.'"...This multi-factor approach does not provide an exhaustive list of factors, but it provides a helpful framework for analysis which will necessarily vary from case to case.

(App. at A11) (internal citations omitted).

Although recognizing the propriety of a multi-factor approach, the Eighth Circuit suggested that certain aspects of that approach concerning so-called "intangible factors" -- such as the property's character as a residence or the effect of forfeiture on innocent occupants and children -- are less relevant in the context of a criminal forfeiture than in the context of a civil *in rem* forfeiture. The court stated:

> [E]specially in criminal *in personam* forfeiture, the property's character as a residence and the effect of forfeiture on innocent occupants are factors whose importance diminishes as the duration and extent of the defendant's culpability and use of the property to facilitate criminal conduct rises.

(App. at A14.) The Bieris assert that the case law provides no basis for holding that the so-called intangible factors are less relevant to an analysis of a criminal forfeiture than a civil *in rem* forfeiture. Certainly, those factors may be less important in a particular case, but that is the essence of a multi-factor proportionality approach. The proper weighing and balancing of each factor will necessarily vary with the specific facts of each case. Further, as the Ninth Circuit recognized in *6380 Little Canyon Road*, this Court discounted the importance of the distinction between civil and criminal forfeitures in its discussion in *Austin v. United States*, 113 S. Ct. 2801 (1993).

The Bieris assert that the forfeiture of their entire farm, particularly that portion which includes the house and barn, constitutes an excessive fine within the meaning of the Eighth Amendment. The Bieris do not deny that the offense of which they were convicted is significant. It is widely recognized, however, that marijuana is a less harmful and threatening substance than other illegal narcotics. *See, e.g.*, United States Sentencing Guideline § 2D1.1 (providing for harsher penalties for possession of drugs such as cocaine, cocaine base, heroin, and LSD as compared with possession of marijuana). Although some evidence was presented to show that the Bieris were involved with the distribution of marijuana for

approximately a two-year period, the evidence does not suggest their involvement in an extensive drug conspiracy involving numerous individuals or extremely large amounts of drugs. It certainly does not suggest their involvement with other illegal drugs.

With regard to the harshness of the penalty, the Bieris point out that while their prison sentences are less than what they might have been had they been involved with other illegal drugs, the terms are still substantial in length. Adding to the severity of the penalty is the fact that the Bieris are incarcerated at the same time, leaving their two young children without daily care and guidance from either parent during a critical period in their young lives.

The actions of the Bieris are sharply distinguishable from those of the defendant in *United States v. Myers*, 21 F.3d 826 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 742 (1994). The defendant in *Myers* made substantial alterations to his barn and the surrounding area to facilitate and conceal a marijuana-growing operation. In essence, his farm was simply a front for illegal activities. In contrast, the Bieris obviously operated a commercially sound and legitimate dairy farm. They raised dairy cows, sold their milk to a major manufacturer of dairy products, and satisfied numerous commercial standards and requirements.

Although the Bieris' farm was used to commit a drug offense, the marijuana concealed on the property could have been concealed in almost any location. There is nothing special about a farmhouse or barn in terms of its ability to conceal

marijuana. Thus, there is no particularly strong nexus between the property and the offense.

The district court found out that the reasonable value of the Bieris' farm was not less than $245,000. (App. at A17.) The Eighth Circuit did not reject this finding. In addition to the farm's monetary value, it also possessed a substantial intangible value to the Bieris, as it is their home, the source of their livelihood, and their primary asset. Certainly, the value of property is an important factor to consider in an excessive fines analysis. The very word "proportionality" suggests that the court must weigh the magnitude of the crime against the severity of the penalty, which surely includes considering the value of the forfeitable property.

In addition to the monetary value of the property, the intangible value of the property to the Bieris is substantial. In *United States v. Real Property Located at 6625 Zumirez Drive*, 845 F. Supp. 725 (C.D. Cal. 1994), the court recognized that a property's "intangible value" was a factor to consider in an excessive fines analysis. *See also 6380 Little Canyon Road*, 59 F.3d at 985 (recognizing intangible value of property, including its character as a residence, as a factor to be considered in an excessive fines analysis). In fact, the Eighth Circuit implicitly recognized the sanctity and importance of the home in *United States v. One Parcel of Real Property Located at 9638 Chicago Heights*, 27 F.3d 327, 331 (8th Cir. 1994). In that case, the court identified "the fact that the property was a residence" as a specific factor to be considered in evaluating the excessiveness of a forfeiture.

The Bieris' farm has been their home for 10 years. It is also the home of their children, Jesse and Sarah, who obviously would suffer from the loss of the family residence. Certainly, the intangible value of the farm is substantial and weighs heavily against the constitutionality of the forfeiture. Under such circumstances, forfeiture of the farm would constitute an excessive fine.

Based on the foregoing arguments and authorities, the Bieris submit that the forfeiture of the farm would violate the Eighth Amendment, and this Court should thus grant their Petition for Writ of Certiorari.

CONCLUSION

In this petition for Writ of Certiorari, petitioners respectfully request that this Court determine whether: (1) the court of appeals violated accepted standards of appellate review in hearing their case; (2) the appellate court's actions violated the due process rights of petitioners; and (3) the forfeiture of petitioners' farm, which is their home and the site of their business, constitutes an excessive fine within the meaning of the Eighth Amendment. In submitting this petition for Writ of Certiorari, petitioners respectfully request that this Court determine the proper standard to be applied to excessive fines challenges under the Eighth Amendment and resolve the conflict that exists among the courts of appeal on this question. Petitioners further assert that the issues presented in this petition involve important questions of federal law that implicate the Fifth and Eighth Amendments of the United States Constitution.

WHEREFORE, for the foregoing reasons, petitioners respectfully request that this Court grant their petition for writ of certiorari as to the decision of the Eighth Circuit Court of Appeals in *United States v. Bieri*, Case No. 95-1234WMS.

Respectfully submitted,

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